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MISTAKE IN THE FORMATION AND PERFORMANCE OF A CONTRACT.

I. PRELIMINARY DISCUSSION.

The law relating to mistake is in a state of great confusion, and several different views have been entertained as to the cause of the difficulty. Mr. Pollock says[1] that the difficulty is mainly verbal, and arises from three causes: (1) confusion of proximate with remote causes of legal consequences; (2) the assertion of propositions as general rules which ought to be taken with reference only to particular effects of mistake in particular classes of cases; (3) omission to assign an exact meaning to the term "ignorance of law."[2] Mr. Kerr is of the opinion[3] that the difficulty has been increased by the fact that no clear and sharp line has been drawn between mistakes in fact and mistakes in law. Mr. Anson[4] thinks that the subject has been confused in two ways: one, from the practice of blending the subjects of mistake and failure of consideration; the other, from the attempt to ascertain the state of mind of the parties, and to distinguish error common to both from error which has misled one.[5]

[1]Contracts (Wald's ed. 1906) 563, (7 Eng. ed.) 441.

[2]See, also, 1 Story, Eq. Juris. (13 ed. 1886) 108, note by Mr. Bigelow.

[3]Fraud and Mistake (4 ed. 1910) 467.

[4]Contracts (2 Amer. ed. 1887) 159, 160, (4 Eng. ed.) 122, 123.

[5]Mr. Pollock's first reason does not seem to have any particular bearing on the subject, and his third reason is included in the reason assigned by Mr. Kerr. These different reasons may be arranged as follows: (1) Attempt to apply general rules to particular effects of mistake; (2) Failure to distinguish between mistake of law and mistake of fact, including failure to ascribe an exact meaning to "ignorance of law;" (3) From attempt to distinguish error common to both from error common to one; (4) Attempt to ascertain the state of mind of the parties; (5) From the blending of mistake and failure of consideration.

We start with the general principle that the law affords no relief in the case of a mistake.[6] Where, therefore, the law corrects a mistake, it must do so for some affirmative reason, and the chief difficulty, as pointed out by Mr. Pollock, has arisen from the attempt to deduce one set of principles from a number of cases belonging to several distinct branches of the law, and wherein, as the relief from mistake is an exception to a general rule, the relief perhaps depends on different principles.

It is the purpose of this article to show that so far as the law of contract is concerned, the results of the cases, although the reasoning is in great confusion, are in substantial accord, and may be arranged under a few well-settled principles of the law with as little conflict as can be expected. We shall therefore discuss only cases of mistake in what may be called a contractual act,[7] with such explanatory reference to other cases as will serve to keep the outlines of the subject clear in the reader's mind.[8]

It is necessary, if possible, to form an accurate conception of what a mistake is. The idea is defined with tolerable accuracy in the popular mind, but it is not easy to frame a definition suitable for the purposes of a legal discussion. Mr. Justice Story[9] defines mistake as some unintentional act,[10] or omission or error arising from ignorance, surprise, imposition or misplaced confidence. This definition is classical and has been incorporated in some codes, and adopted by most modern writers who have attempted to define mistake.[11] It is, however, entirely too broad.[12]

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[6]Pollock, Contracts (Wald's ed. 1906) 564, (7 Eng. ed.) 441.

[7]Such cases of mistake in a non-contractual act as were discovered in running through the books, are collected in the note at the end of the concluding part of the article.

[8]We have thus avoided the first of the difficulties mentioned in note 5 *supra.*

[9]1 Eq. Juris. (13 ed. 1886) 108.

[10]Mr. Jeremy says that mistake in the sense of a court of equity is "that result of ignorance of law or of fact which has misled a person to commit that which if he had not been in error he would not have done." Eq. Juris. B. 3, Pt. 2, p. 358 (1828). This definition seems too narrow in that it does not comprehend cases of omission or neglect; see 1 Story, Eq. Jur. (13 ed. 1886) 108, n. 1. Mr. Leake says: "Mistake is occasioned by ignorance or misconception of some matter under influence of which an act is done; so that the intention and legal consequence presumptively attributable to the act are rebutted or modified by evidence of the mistake; but mere forgetfulness is not necessarily equivalent to mistake." Contracts (4 ed., London, 1902) 206.

[11]Some writers, however, as, for instance, Mr. Pollock and Mr. Anson, do not offer any definition at all.

[12]See comments of Mr. Kerr, Fraud and Mistake, (4 ed. 1910) 465. This learned author makes no attempt to define mistake.

A man may intend an act with all the force of his mind, and yet make a most egregious mistake. Furthermore, the notion of mistake entirely precludes the idea of the act being induced by imposition or misplaced confidence. When the latter is the case, there is fraud. The distinction between fraud and mistake is often difficult to draw as a matter of fact, but seems clear on principle.[13]

The conception of a mistake involves, in the first place, the idea of action, as mistake can never be predicated of a state of mind. The individual who never does anything never makes a mistake, unless it could be said that he makes a mistake in life by never doing anything. A mistake, therefore, consists in doing something; it consists in doing something which, it afterwards turns out, is wrong. A mistake may be said to have occurred where a person, acting as the result of his own untrammeled volition, has said something, done something, or promised to do something, and then discovered in the light of subsequent knowledge, that he would rather, on the facts as they existed then, have acted differently.[14]

The notion of a mistake has always been confined to a mistake with reference to a past or present fact,[15] and will be so considered in this article. The cases of mistake as to the future are generally discussed under the heading of impossibility of performance, and seem properly to belong to that branch of the law, and do not, therefore, further concern us here.[16] In these cases the parties have made a perfect contract, and by reason of the occurrence of subsequent circumstances, it becomes impossible for one or the other party to perform his part of the agreement.

[13]This distinction is well settled and often referred to in the books. See Pollock, Contracts (Wald's ed. 1906) 562, (7 Eng ed.) 439; Kerr, Fraud and Mistake (4 ed. 1910) 476.

[14]A mistake may occur through ignorance, negligence, forgetfulness, heedlessness, surprise, confusion, accident, etc. The law, so far as the subject in hand is concerned, rarely takes account of any of the mental states accompanying the mistake. See 1 Story, Eq. Juris. (13 ed. 1886) 108, n. 1. It is the tendency of many judges and writers to confuse the accompanying state of mind with mistake. The mistake may be said to be the result or consequence of the ignorance, etc. This is the fourth difficulty mentioned in note 5 *supra.*

[15]Abbot, Mistake of Fact as a Ground for Affirmative Equitable Relief, 23 Harv. L. Rev. 608, 624 (1910).

[16]For a few of these cases, see Griffith *v.* Sebastian County (1886) 49 Ark. 24, Keener, Vol. 3, p. 217; Miles *v.* Stevens (1846) 3 Pa. St. 21; Bishop *v.* Reed (Pa. 1842) 3 W. & S. 261; Quick *v.* Stuyvesant (N. Y. 1830) 2 Paige 84; Parke *v.* City of Boston (1900) 175 Mass. 464; Moore *v.* Des Arts (1848) 1 N. Y. 359; Kempson *v.* Saunders (1826) 4 Bing. 5; Union Bank of Georgetown *v.* Geary (1831) 5 Pet. 99.

The circumstance may have been totally unexpected or may have been in the contemplation of the parties as occurring one way, and then has occurred in another. While this distinction may be of importance, it does not bring these cases any nearer to the limits of this article.

At this point we must distinguish the cases of deceit and misrepresentation. We shall deal only with the case of an act done in formation of the contract, or an act done in performance of the contract, and shall consequently exclude the case of an act done to induce the other party to enter into the contract. Thus, where the seller represents that the article he is selling is of a certain quality, and, in consequence of the representation, the purchaser agrees to buy, the contract consists of the offer and acceptance fixing the price and delivery of the article, and the previous representation as to the quality, while leading the other party into the formation of the contract, forms no part of the contract itself. Cases of express warranty are also, for this reason, outside our limits, as are also cases of honest mistake in making a statement inducing the formation of the contract.[17]

The subject of mistake was originally, and is still, considered as a heading of equitable relief. When a mistake was made, the Chancellor was called upon to exercise his powerful jurisdiction to relieve the parties from the consequences, and the common law afforded little opportunity for such relief. Much of this equitable jurisdiction was introduced into the common law by the action for money had and received. Accordingly, the subject has been approached from this point of view, and the question of when money paid under mistake may be recovered, has been discussed at length by a number of learned authors,[18] who do not distinguish between money[19] paid under mistake in the performance of the contract, and money paid in mistake where there is

[17]For instances of which, see Rashdall *v.* Ford (1866) L. R. 2 Eq. 750; Kennedy *v.* Panama Mail Co. (1867) L. R. 2 Q. B. 580; Phillips *v.* Hollister (Tenn. 1865) 2 Cold. 269; Freeman *v.* Curtis (1862) 51 Me. 140; Bridges *v.* McClendon (1876) 56 Ala. 327; Lanier *v.* Hill (1854) 25 Ala. 554; Belknap *v.* Sealey (1856) 14 N. Y. 143; Spurr *v.* Benedict (1868) 99 Mass. 463. See also remarks of Mr. Abbot, 10 Harv. L. Rev. 508 (1897).

[18]Keener, Quasi Contracts (1893) 26 *et seq.* has the best discussion from this point of view.

[19]Pollock, Contracts (Wald's ed. 1906) 579, (7 Eng. ed.) 457, says that the subject of money paid under mistake does not fall within the scope of his treatise, overlooking the circumstance that the remedy in question is frequently used as a means of affording relief in cases of mistake in formation.

no contract, as, for instance, where money is paid in satisfaction of a supposed tort, or in payment of taxes supposed to be due.[20]

We shall lay aside, for the moment, the distinction between mistake of law and mistake of fact which is drawn in these discussions, and about which something will be said in the next paragraph, and point out that, so far as the law of contracts is concerned, the cases of money paid under mistake may be arranged under several headings corresponding with the classification we have adopted, as follows: (1) money paid in performance of a contract with a mistake entering into the formation; (2) money paid in mistaken performance of a contract; (3) money paid where the other party has made a mistake in performance; (4) money paid in performance where there is some defence to the payment of which the party paying was ignorant.[21] The cases relating to money paid in mistake, it is believed, can never be clearly understood unless they are classified under headings of substantive law, without reference to the question of remedy.

The most embarrassing difficulty in the entire subject is the supposed necessity for drawing a distinction between mistakes of law and mistakes of fact. This distinction has been drawn by great authority, and the general principle laid down that there can be no recovery of money paid under mistake of law, and, as a corollary to that proposition, that there can be no relief of any kind from the consequences of a mistake of law. No distinction was formerly drawn between mistakes of law and mistakes of fact,[22] and it was first said by way of *dictum* in 1802, in England, that there could be no recovery of money paid under a mistake of law,[23] the remark apparently being based upon the proposition that everyone must be presumed to know the law. The propriety of applying this presumption outside of the criminal law has been vigorously assailed, and the validity of the distinction between mistakes of law and mistakes of fact has little support in reason, although

[20]Mr. Keener, however, says: "Usually the money which the plaintiff seeks to recover as paid by him and received by the defendant, under mistake, was paid not in creation of * * * but * * * in discharge of an obligation." Quasi Contracts (1893) 26.

The following are a few cases of money paid under non-contractual mistake: Mistake in payment by trustee to *cestui que trust;* Rogers *v.* Ingham (1876) L. R. 3 Ch. Div. 351, Keener, Vol. 3, p. 75; overpayment of amount of award in eminent domain proceedings; Mayor *v.* Erben (N. Y. 1863) 10 Bosw. 189.

[21]See Keener, Quasi Contracts (1893) 120.

[22]Keener, Quasi Contracts (1893) 85, n. 4, and cases cited.

[23]Bilbie *v.* Lumley (1802) 2 East 469; Keener, Quasi Contracts 85.

it is frequently observed by the courts.[24] Furthermore, the distinction between a mistake of law and a mistake of fact is as elusive and difficult to draw as is the distinction between law and fact themselves.[25] Since no one has been able to state with any clearness the principle upon which the distinction proceeds, or to furnish any test by which it can be applied, and as the decided cases are in hopeless confusion when studied with the distinction in mind, there seem to be a few good reasons for discarding it altogether.[26]

It is apprehended, further, that at least so far as mistake in the formation and performance of a contract is concerned, the distinction we have just referred to is totally immaterial. If we distinguish between mistakes of law and mistakes of fact, the cases resolve themselves into hopeless confusion. If the distinction is disregarded, the cases can be arranged with very little conflict under a few well-settled principles. For these reasons we shall pay no further attention to the distinction in this article.[27]

It frequently happens that an agent makes a mistake in the performance of his duty, the performance of which, on behalf of the principal, involves a performance of the contract. The question arises here as to how far the principal is affected by the mis-

[24]For some of the discussions on the subject, see, Keener, Quasi Contracts (1893) 85 *et seq.;* "Mistake of law as a ground of equitable relief," M. M. Bigelow, 1 Law Q. Rev. 298 (1885); "Mistake of law again," M. M. Bigelow, 2 Law Q. Rev. 78 (1886); notes in 11 Harv. L. Rev. 475 (1898) and 14 Harv. L. Rev. 467 (1901); note in 8 COLUMBIA LAW REVIEW 211 (1908), pointing out the eight criteria for relief from unilateral error of law and the failure of the tests to explain the exercise of the relief; "Money paid under mistake of law," F. C. Woodward, 5 COLUMBIA LAW REVIEW 366 (1905); "Error of law," Corry Montague Stadden, 7 COLUMBIA LAW REVIEW 476 (1907), and see comment on this article in 21 Harv. L. Rev. 225 (1908); "A Critical Analysis of the Law as to Mistake in its Effect upon Contracts," Truman Post Young, 38 Amer. L. Rev. 334 (1904); "Money paid under mistake of law," address by R. C. Douglas, Kan. State Bar Assn. Proceedings (1909) 61; notes, 2 Albany L. J. 405 (1870), 3 Albany L. J. 448 (1871), 4 Albany L. J. 7 (1871), 6 Albany L. J. 103 (1872); "Essential error," Hector Burn Murdock, 22 Jurid. Rev. 222-236 (1910); Crosby Johnson, 18 Cent. L. J. 7 (1884); "Money paid under mistake as to a collateral fact," C. H. Tuttle, 63 Albany L. J. 340 (1901), and comment in 15 Harv. L. Rev. 324 (1901).

[25]See, on this point, remarks of Jessel, M. R., in Eaglesfield *v.* Marquis of Londonderry (1875) L. R. 4 Ch. D. 693 at 702; Keener, Vol. 3, pp. 51-52. Comments of Mr. Justice Story, 1 Eq. Juris. (13 ed. 1886) 136, sec. 126. See excellent discussion by Mr. Keener, Quasi Contracts (1893) 91-112.

[26]See 1 Story, Eq. Juris. (13 ed. 1886) p. 145, sec. 137, n. 5.

[27]We have thus concluded that part of the difficulty is caused by the attempt to draw the distinction between mistake of law and mistake of fact, while it has been said by great authority (see n. 5 *supra*) that part of the difficulty has been caused by the failure to make that distinction.

take of the agent, and how far an agent must shoulder the responsibility of the mistake himself. The solution of these cases depends on the principles of the law of agency, and does not further concern us here.[28]

In like manner, the cases dealing with the question of how far a court of equity will correct a mistake in the case of a gift either on behalf of the donor or donee, lie entirely outside of our discussion. A number of these cases are collected in the note,[29] as they were discovered in running over the authorities on the subject. In a great many of them, where the court refused relief, it did so on the ground that the case was a mistake of law. How far that consideration was properly involved does not concern us here.[30]

It sometimes happens that one party has made a mistake in

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[28]For a few of the cases, see Gray *v.* Supreme Lodge (1888) 118 Ind. 293, Keener, Vol. 3, p. 446; Duke of Beaufort *v.* Neeld (1844) 12 Cl. & F. 248; Levy *v.* Terwilliger (N. Y. 1881) 10 Daly 194; Hasbrouck and McCulloch *v.* Teleg. Co. (1899) 107 Ia. 160; Natcher *v.* Natcher (1864) 47 Pa. St. 496; Nourse *v.* Jennings (1902) 180 Mass. 592; Berganthal *v.* Fiebrantz (Mass. 1866) 12 Allen 342; Comer *v.* Granniss (1885) 75 Ga. 277; Bostock *v.* Jardine (1865) 1 H. & C. 700; Borden *v.* R. R. Co. (1893) 113 N. C. 570.

[29]In these cases, on application by the donee, the court refused to reform the conveyance: Else *v.* Kennedy (1885) 67 Ia. 376, Keener, Vol. 3, p. 429; Fowler *v.* Black (1891) 136 Ill. 363; Keener, Vol. 3, p. 100, put by the court on the ground of mistake in law; Gebb *v.* Rose (1874) 40 Md. 387; Keener, Vol. 3, p. 425; Powell *v.* Morisey (1887) 98 N. C. 426; Powell *v.* Powell (1858) 27 Ga. 36; Hout *v.* Hout (1870) 20 Ohio St. 119; Shears *v.* Westover (1896) 110 Mich. 505; Dennis *v.* Dennis (S. C. 1852) 4 Rich. Eq. 307.

In this case the donor was refused assistance: Eldridge *v.* Dexter R. Co. (1895) 88 Me. 191, Keener, Vol. 3, p. 158; Wier *v.* Johns (1890) 14 Colo. 493; Mills *v.* Evansville Seminary (1879) 47 Wis. 354; Groff *v.* Rohrer (1871) 35 Md. 327.

In these cases the deed was reformed in favor of the donor after his death: McMechan *v.* Warburton L. R. Ir. [1896] 1 Ch. 435.

In these cases the court refused reformation on behalf of the donor after his death: Willey *v.* Hodge (1899) 104 Wis. 81; Enos *v.* Stewart (Cal. 1902) 70 Pac. 1005; Picton *v.* Graham (S. C. 1808) 2 Dess. 592; Coale *v.* Merryman (1871) 35 Md. 382.

In these cases the deed was reformed on behalf of the donor in his lifetime: Andrews *v.* Andrews (1859) 12 Ind. 348; Mitchell *v.* Mitchell (1869) 40 Ga. 11; Day *v.* Day (1881) 84 N. C. 408; Lister *v.* Hodgson (1857) L. R. 4 Eq. 30, money settled by parol deed subsequently executed inconsistent with trusts declared by parol; Shedwick *v.* Church (1894) 160 Pa. St. 57.

For cases where one of the donees proceeded against another donee and had the deed of gift corrected, see Farrell *v.* Farrell (1903) 53 W. Va. 515; Huss *v.* Morriss (1869) 63 Pa. St. 367.

[30]Mr. Abbot, "Mistake of fact as a ground for affirmative equitable relief," 23 Harv. L. Rev. 608 at 618 (1910), points out that the donor is entitled to reformation where there is a mistake in the writing embodying the gift, and that the donee is not entitled to reformation. See, also, Mr. Bigelow's note to 1 Story, Eq. Juris. (13 ed. 1886) 156.

the formation or performance of a contract, and, at the same time, promised to do or has done an illegal act. These cases are more properly classified under the heading of illegality.[31]

Where the parties agree upon the basis that the fact, which enters into the formation of the agreement, is doubtful, and the consequent risk each is to encounter is taken into consideration in the stipulations assented to, the law will afford no relief, notwithstanding the mistake of one of the parties, provided there be no concealment or unfair dealing by the opposite party.[32] In such a case, each party takes the risk of the fact in the case being one way or the other, and he generally has no ground for redress if the event turns out otherwise. While, it is true, he has made a mistake in his judgment, yet the law says that since his attention was called to the matter, and he chose to proceed as he did, without further investigation, he must take the consequences.[33]

II. Mistake in Formation.

The attention of the learned reader is now invited, after this somewhat lengthy preliminary discussion, to the subject of this article. This digression was necessary, however, because of the confusion in which the subject is generally involved, as there is no hope for a satisfactory conclusion unless we have a clearly defined starting point with the surrounding underbrush cleared away. There is some advantage, furthermore, to the reader if he is plainly told what he will not find; he will then very easily make up his mind whether to proceed further or not.

The subject will be discussed under the following headings: (1) Mistake in the formation of a contract; (2) Mistake in reducing the contract to writing; (3) Mistake in the performance of the contract. This classification is somewhat novel and must be justified by reason and the cases, although it cannot be justified by the authority of the text writers. The leading writers on the law of contract treat the subject of mistake chiefly as it affects the formation of the contract, and in none of them is the classification we have adopted insisted upon. We shall briefly refer to some of the views which have been entertained.

Mr. Pollock says:[34]

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[31] *E. g.*, see Pond-Decker Lumber Co. *v.* Spencer (1898) 86 Fed. 846; Leavitt *v.* Palmer (1849) 3 N. Y. 19.

[32] Tilghman, C. J., in Perkins *v.* Gay (Pa. 1817) 3 S. & R. 327.

[33] See Ashcom *v.* Smith (Pa. 1830) 2 P. & W. 211. Other instances of the application of this principle are pointed out in the notes.

[34] Pollock, Contracts (Wald's ed. 1906) 563, (7 Eng. ed.) 440.

"Mistake does not *of itself* affect the validity of contracts at all. But mistake may be such as to prevent any real agreement from being formed; in which case the agreement is void; or mistake may occur in the expression of a real agreement; in which case, subject to rules of evidence, the mistake can be rectified."[35]

Mr. Anson[36] treats of mistake in the chapter on reality of consent. He says that mistake is a question which affects the meeting of the minds of the parties in the formation of a contract, and then says:

"The parties may not have meant the same thing; or one or both may, while meaning the same thing, have formed untrue conclusions as to the subject matter of the agreement. This is mistake."[37]

Mr. Justice Holmes[38] treats mistake as preventing the formation of the contract, and says,[39] that when mistake is said to make a contract void, there is no new principle which comes in to set aside an otherwise perfect obligation, but that in every such case

[35]Mr. Pollock, Contracts (Wald's ed. 1906) 574, (7 Eng. ed.) 452, further says that the special cases in which mistake is of importance are as follows: (1) Where mistake is such as to exclude real consent, and so prevent the formation of any contract, there the seeming agreement is void. (2) Where a mistake occurs in expressing the terms of a real consent, the mistake may be remedied by the equitable jurisdiction of the court. (3) A renunciation of rights in general terms is understood not to include rights of whose actual or possible existence the party was not aware. (4) Money paid under a mistake of fact may be recovered back. No. 3, of course, does not necessarily include mistake in a contract. No. 4 includes mistake in performance of the contract and other mistakes, and on the whole, the case of mistake in the performance of a contract is omitted.

[36]Anson, Contracts (8 ed. N. Y. 1903) 156.

[37]Mr. Anson, Contracts (8 ed. N. Y. 1903) 159, first eliminates from the discussion of mistake the following cases: (1) Mistakes of expression, cases where the parties are agreed, but the terms of the agreement do not convey their true meaning. (2) Cases where the offer and acceptance never agree in terms, so there never was an outward semblance of an agreement. (3) Where the assent of one party has been influenced by a false statement, innocent or fradulent, or by violence or oppression. (4) Cases where a man is disappointed as to his power to perform the contract, or in the performance of it by the other.

Mr. Anson further says, Contracts (8 ed. N. Y. 1903) 158, that if the performance does not correspond to the terms of the contract, we cannot say that the rights of the parties are affected by mistake, and that "Every honest man making a contract expects that he and the other party will be able to perform, and will perform his undertaking. If the disappointment of such expectation were called mistake, then mistake would underlie every breach of contract which had not been deliberately intended by the parties before the contract was made." It is to be remarked that it is not the disappointment of the expectation which is the mistake; it is the doing of the act by the other party which is a mistake.

[38]Common Law (1881) 308, 309.

[39]Common Law (1881) 315.

there is wanting one or more of the first elements of a contract. Either there is no second party, or the two parties say different things, or essential terms seemingly consistent are really inconsistent as used. In these remarks, the learned author confines his attention solely to mistake in the formation of the contract, and makes no comment on the case of mistake in performance.[40]

It is clear, therefore, that there is little unanimity among the text writers, although some of them hint at the analysis we have adopted. We shall now ascertain how the matter stands upon principle and the decided cases. The subject of mistake in formation is first in order, before proceeding to which, however, the attention of the learned reader is invited to the distinction between (1) the mistake which prevents the formation of a true contract, (2) the mistake which though entering into, does not prevent the

[40]Mr. Leake, Contracts (4 ed. London 1902) 206, classifies mistake as a cause rendering a contract void or voidable of legal effect, and says (p. 207), "Mistake affecting agreements may be distinguished as follows:—It may affect the act of agreement, so that a party appears to agree when, in fact, he does not, or it may affect the expression of the terms of agreement, which therefore express incorrectly or insufficiently the actual intention, or it may occur in the facts and circumstances which form the inducement to the agreement, so that the agreement made is not intended to apply to the actual facts and circumstances. * * * Further distinctions appear in the effect of mistake in the above cases where the mistake is that of one party only, known or not known to the other, and where it is a mistake common to both parties."

Mr. Bishop, Contracts (2 ed. 1907) Secs. 699, 703, 707, 709, seems to have in mind the distinction between mistake in formation and mistake in performance, although he does not bring it out. He confuses mutual mistake and treats it as preventing the formation of the contract (Sec. 702), although perhaps using the terms as meaning a misunderstanding.

Mr. Benjamin, Sales (2 ed. N. Y. 1877) Sec. 50 *et seq.*, and 414 *et seq.*, distributes the subject of mistake under the headings of formation and avoidance of the contract, but the learned editors of the last edition (London, 1906) have transferred the entire chapter on mistake to the chapter on Mutual Assent, and have treated it exclusively as affecting the reality of consent.

In an editorial note in 19 Harv. L. Rev. 290 (1906), it is said that a distinction should be drawn between three classes of cases in which, on account of a mutual mistake of fact, equity is asked to give affirmative relief, and that these three classes are: (1) Where there is a failure to complete the formation of a legal contract, in which case equity does not interfere, as the contract is unenforceable at law; (2) Where a legally valid contract has been entered into under a mutual mistake as to certain material facts which form the conscious inducement of the contract, and where no true reformation is decreed because there is no previous contract with which the agreement can be squared; (3) The expression or performance of a contract already formed, which because of mutual mistake or mistake of one party and the fraud of the other, is incorrect, in which case equity makes the performance or the contract conform to the original agreement by such decree as seems proper. In this last heading the learned editors have touched on the distinction between mistake in reducing the contract to writing and mistake in performance.

formation of the contract, and which may or may not be the ground for relieving one party or the other from its burden, and (3) the mistake occurring subsequently, as mistake in reducing the contract to writing, or mistake by one party or the other in the performance of the contract. These distinctions, when clearly borne in mind, will materially contribute to a proper understanding of the subject.

Mistake entering into the formation of the contract may be divided into three headings: (1) such mistake as will prevent the formation of the contract; (2) such mistake as will not prevent the formation of the contract, but may or may not be a ground of relieving one party or the other from its burden; (3) such mistake as will neither prevent formation nor be any ground for relief to the party making the mistake. Mistake, furthermore, is of two kinds, unilateral and mutual. By unilateral mistake is meant a mistake made by one party to the contract; and by mutual mistake is meant a mistake made by both parties to the contract.

The case of mutual mistake is to be subdivided into (1) the case where the parties do not agree in the terms of the offer and acceptance, and there is, therefore, no contract formed, and (2) the case where the terms of the offer and acceptance agree, but the parties in that agreement both make the same mistake. The first instance of mistake prevents the formation of the contract, and the second does not prevent the formation, but may or may not be ground for relieving the parties from the burden of the obligation.

The first two cases of mistake entering into the formation of the contract to which we have referred, are both cases of mutual mistake, but one is a case of misunderstanding, and the other a case of mutual mistake proper. The term mutual mistake, however, is loosely used by many judges and text writers to include both cases.[41]

[41]See discussion of the meaning of mutual mistake by Mr. Truman Post Young in an article entitled "A Critical Analysis of the Law as to Mistake in its Effect upon Contracts," 38 Amer. L. Rev. 334 (1904). The learned author very clearly points out the confusion in the books in the use of the term mutual mistake. He seems to think, however, that there are two kinds of mutual mistake, one justifying the reformation of the contract, the other justifying the rescission. Relief by way of reformation, however, is only applicable to a writing, and can therefore only be predicated of a mistake in reducing a contract to writing or a mistake in a writing which is the performance of a contract, in neither of which cases is there any necessity for the mistake to be mutual; and the doctrine of rescission applies only to such case of mutual mistake in formation as will be relieved by the law. It is apprehended, therefore, that the distinction drawn by the learned author is of no validity.

It is often said that where there is a mutual mistake, the minds of the parties never meet and there is no true contract. This is true if the term mutual mistake is used as meaning mutual misunderstanding. If, on the other hand, the parties have both made the same mistake, there is certainly a meeting of the minds, and if the offer and acceptance agree, it is difficult to escape from the conclusion that there is a true contract formed according to the rules of the common law.

The term mutual mistake will be used in this article, and this seems to be its proper significance, as meaning the same mistake made by both parties to the contract, in which case there must necessarily be a complete agreement in the offer and acceptance.

Misunderstanding.

We shall first take up the case of a misunderstanding, in considering which we must distinguish several cases: (1) where the offer and acceptance apparently agree but there is a latent ambiguity because of which the minds of the parties do not meet; (2) where the offer and acceptance do not agree on their face,—the case of a bilateral contract; (3) where the offeree performs or attempts to perform upon a misapprehension of the terms of the offer,—the case of a unilateral contract.

The leading case upon latent ambiguity in the offer and acceptance is the case of *Raffles* v. *Wichelhaus*,[42] where the parties agreed to buy and sell 125 bales of Surat cotton to arrive ex Peerless from Bombay, with certain other terms as to the time of payment. It appeared that the seller had in mind a ship called the Peerless which sailed from Bombay in December, and the purchaser had in mind a ship called the Peerless which sailed from Bombay in October, the parties apparently being ignorant of the circumstance that there were two ships of the same name sailing from that port. The purchaser refused to take the cotton, and on suit being brought against him by the seller, judgment was given for the defendant. The court, apparently, based the decision on the ground that there was no meeting of the minds of the parties, and therefore no complete contract.[43]

[42](1864) 2 H. & C. 906; Langdell, Cases on Contract 39.

[43]Mr. Justice Holmes, Common Law (1881) 309, understands the case as proceeding on the ground of misunderstanding of the parties, but takes the position that the misunderstanding was to be gathered from the externals, as he happily phrases it, and not from the state of the parties' minds, and, in the case of Mead *v.* Ins. Co. (1893) 158 Mass. 124 at 125, the learned judge intimates that the case was one of latent ambiguity.

In this case the offer and acceptance apparently agreed on the face but there was a latent ambiguity owing to the circumstance that there were two ships by the name of Peerless sailing from Bombay, and upon it appearing that such was the case, and that one party meant one ship and the other party the other, it was clear there was no contract. The time of the arrival of the ship was probably a material factor owing to the condition of the cotton market. This is a rare case of misunderstanding and no other case like it has been found.

The other two cases, one, where the offer and acceptance do not agree, the case of a bilateral contract, and the other, the case where one party performs under a misapprehension as to the terms of the offer, the case of a unilateral contract, present no difficulty, and a number of them are collected indiscriminately in the note. In all of them it is clear that there is no contract.[44]

It is difficult to see how the misunderstanding could be shown except by parol evidence. Mr. Benjamin, Sales (2 ed. N. Y. 1877) Sec. 417, understands the case as a unilateral mistake of one party as to the name of the ship unknown to the other party, of which he must bear the consequences, but in Sec. 50 cites the case as one of mutual misunderstanding. Mr. Pollock, Contracts (Wald's ed. 1906) 599, (7 Eng. ed.) 475, considers this as a case of fundamental error preventing an agreement, an error as to the specific thing *in corpore*. Mr. Addison, Contracts (10 ed. 1910) 43, 121, takes the position that there was no contract because the parties did not agree, owing to the latent ambiguity.

"Vendor thought he was selling a lot on one side of the street; vendee thought he was buying a lot on the other side. Vendee entitled to recover amount paid as down money. Stong *v.* Lane (1896) 66 Min. 94. See, also, Kyle *v.* Kavanagh (1869) 103 Mass. 356. Agent of vendor pointed out wrong lot; deed delivered; purchase money paid; vendee tendered deed and sued in action for money had and received for the consideration and recovered. McKinnon *v.* Vollmar (1889) 75 Wis. 82. Vendee under bond for the conveyance of a certain lot of ground assigned the bond to A. for a certain consideration. There was a mutual mistake as to the lot of ground described in the bond, the parties having looked at the wrong lot, and it was held that A. could recover the money paid. Norton *v.* Marden (1838) 15 Me. 45. Misunderstanding of the vendor and vendee as to the price of the land. Werner v. Rawson (1892) 89 Ga. 619. So, also, the case put by Benjamin, Sales, Sec. 416, is one of mutual misunderstanding, where A. sends a case of wine to B., intending to sell it, and B., thinking it is a gift, consumes it. As the learned author says, there is no reason to hold B. responsible for the price because, as he says, B. is blameless for the mistake. It is apparent, however, that each party made a mistake and there was no contract. Auctioneer put up for sale parcel No. 24. C. bid, supposing it to be parcel No. 25, and it was struck off to him. There was no contract. Sheldon & Barton *v.* Capron (1855) 3 R. I. 171. Where one party offered a mare for $165, and the other thought the offer was $65 and that his acceptance was of the smaller amount, the court held there was no contract. Rupley *v.* Dagget (1874) 74 Ill. 351. Mr. Bishop, Contracts (2 ed. 1907) Sec. 702, however, erroneously it is apprehended, considers this a case of mutual mistake. Where the insured and the underwriter understood the words in the application as to a matter material to the risk in a different sense, and the policy was issued founded on such misunderstanding, it was held that the policy was void.

If the contract has been partly or wholly performed by one party or the other, upon the mistake being discovered, the law will afford appropriate relief. Thus, if one party has paid the money due or supposed to be due, he can recover it back.[45] If necessary, the supposed contract will be rescinded and the parties placed in *statu quo,* each being required to return the attempted performance.[46] So, also, the purchaser who takes goods under an ambiguous offer must pay for them, as he cannot enforce an unconscionable construction on the offer uncommunicated to the other side.[47]

Where it is impossible to restore the performance, as where that performance consists of work done or the goods have been consumed, the law rejects the supposed contract and awards reasonable compensation against the party who has been benefited by the performance which cannot be restored.[48]

Mutual Mistake in Formation.

We now come to the case of a mutual mistake in the formation of a contract, that is, the case where each party in the offer and acceptance makes the same mistake as to the same thing. There is in these cases a perfect agreement between the parties as to all the terms, and, in some of them, the law permits the parties to be relieved from the burden of the contract, and in some it does not. It is clear, therefore, that the mere circumstance that they have made a mutual mistake is not of itself sufficient; there must be some other element present to explain the relief afforded by the law.

Hazard *v.* Ins. Co. (1832) 1 Sumner 218. Ins. Co. issued policy on a building as a machine shop when it was in fact an organ factory, on which the risk was greater. The insured was unable to recover on the policy as there was no contract. Goddard *v.* Ins. Co. (1871) 108 Mass. 56.

For other cases of misunderstanding, see Cutts *v.* Guild (1874) 57 N. Y. 229; Mead *v.* Ins. Co. (1893) 158 Mass. 124; Reilly *v.* Gautschi (1896) 174 Pa. St. 80; Greene *v.* Bateman (R. I. 1846) 2 Wood & M. 359; Rovegno *v.* Defferari (1871) 40 Cal. 459; Peerless Glass Co. *v.* Pacific etc. Co. (1898) 121 Cal. 641; Thornton *v.* Kempster (1814) 5 Taunt. 786; Page *v.* Higgins (1889) 150 Mass. 27; Edwards *v.* Hardwood Mfg. Co. (Minn. 1894) 60 N. W. 1097; Harran *v.* Foley (1885) 62 Wis. 584; Bottorf *v.* Lewis (1903) 121 Ia. 27; Singer *v.* Match Co. (1903) 117 Ga. 85; Harvey *v.* Harris (1873) 112 Mass. 32; Postal Tel. Co. *v.* Schaefer (1901) 110 Ky. 907 *semble*; Burton *v.* Rosemary Co. (1903) 132 N. C. 17; Russell *v.* Clough (1901) 71 N. H. 177; Rowley *v.* Flannelly (1879) 30 N. J. Eq. 612.

[45]McDonald *v.* Lynch (1875) 59 Mo. 350.

[46]Norton *v.* Bohart (1891) 105 Mo. 615.

[47]Butler *v.* Moser (1885) 43 Ohio St. 166.

[48]Turner *v.* Webster (1880) 24 Kan. 38; Fear *v.* Jones (1858) 6 Ia. 169; Hartford R. R. Co. *v.* Jackson (1856) 24 Conn. 514.

We shall first endeavor to classify the cases in which the law does afford relief, and those in which it does not afford relief, and then see if any guiding principles can be discovered.

The most conspicuous instance of a relievable mutual mistake in the formation of a contract is the case of a lease of land where the parties mutually assume that the land contains valuable natural deposits, which the lessee is to dig and for which he is to pay a royalty to the lessor, and it turns out that there are no such deposits on the land. In this case the law is clear: that the lessor cannot recover the royalty.[49] The lessee, however, has no remedy against the lessor for outlay in the event of failure.[50] The law, therefore, only relieves the party prejudiced by the mistake from the burden of the contract. The lease, however, may be so drawn that the lessee is to pay rent whether any natural deposits are found or not. In this case the lessee has taken a chance and cannot complain.[51] This is not, however, a case of mistake, because the attention of the parties was called to the doubtful fact, and they expressly provided for it in the lease.

Another class of cases occurs where there is a mutual mistake as to the existence of the thing sold. The leading case on this branch of the law is *Couturier* v. *Hastie*,[52] where there was a sale of a cargo of corn at sea, the parties being ignorant of the circumstance that the cargo had been damaged and sold. The purchaser repudiated the contract, and it was held that the seller could not recover the price of the cargo; he was unable to fulfill his part of the agreement, and even on the strictest principles of the common law could recover nothing, as he could neither aver a performance nor readiness and willingness to perform.[53]

[49]Buchanan *v.* Layne (1902) 95 Mo. App. 148; Muhlenberg *v.* Henning (1887) 116 Pa. St. 138; Kemble Coal & Iron Co. *v.* Scott (Pa. 1884) 15 W. N. C. 220; Gribben *v.* Atkinson (1887) 64 Mich. 651; Brick Co. *v.* Pond (1882) 38 Ohio St. 65; Blake *v.* Lobb's Est. (1896) 110 Mich. 608; Cook *v.* Andrews (1880) 36 Ohio St. 174; Fritzler *v.* Robinson (1886) 70 Ia. 500; St. Louis, S. W. R. R. Co. *v.* Johnston (Tex. 1910) 125 S. W. 61; Mays *v.* Dwight (1876) 82 Pa. St. 462; Du Bois Boro. *v.* Water Works Co. (1896) 176 Pa. St. 430 *semble*. For a case of unilateral mistake under similar circumstances, see Bible *v.* Centre Hall Boro. (1902) 19 Pa. Super Ct. 136.

[50]Harlan *v.* Lehigh Coal Co. (1860) 35 Pa. St. 287.

[51]For instances of such cases, see Jeffreys *v.* Fair (1876) L. R. 4 Ch. D. 448; Jowett *v.* Spencer (1847) 1 Exch. (W. H. G.) 647; Jervis *v.* Thompson (1856) 1 H. & N. 195; Marquis of Bute *v.* Thompson (1844) 13 M. & W. 486.

[52](1856) 5 H. L. C. 673; s. c. 25 L. J. Ex. 255.

[53]Mr. Pollock, Contracts (Wald's ed. 1906) 540, (7 Eng. ed.) 420, says that there was no contract at all in this case, and discusses it under the heading of impossibility of performance.

The only difficulty in these cases arises where the purchaser is willing to pay the price, and seeks to recover from the seller damages for failure to perform. At common law he could recover, but equity to remedy the obvious injustice relieves the seller from liability on the contract.[54] In like manner, in the case of a sale or lease of real property, where there is a mutual mistake as to title, and it turns out that the vendee or lessee is in fact buying or leasing his own title, or that the title is in a third party, the law is clear that the vendee or lessee will not be compelled to pay for something he does not get. Agreements of this kind are particularly under the jurisdiction of equity owing to the doctrine of specific performance, and it is apparently well settled that the Chancellor will not compel specific performance on behalf of the vendor when the vendor or lessor has no title to offer, because the vendee will not be compelled to pay something for nothing, and no decree of specific performance will be entered against the vendor or lessor, because the Chancellor cannot compel the doing of an impossibility, that is, he cannot compel a man to convey a title he does not own. As it is clear that this will be done while the contract is executory, it must accordingly follow, after the contract has been executed, that a court of equity will decree restoration and prevent an unjust enrichment.[55]

[54]So also in case of the sale of a horse which was dead but which both parties believed to be alive. *Dictum* in Allen *v.* Hammond (1837) 11 Pet. 63. Sale of judgment not in existence. Gibson *v.* Pelkie (1877) 37 Mich. 380. Sale of a right of way which had been extinguished under a rule of law, of which both parties were ignorant, and which right of way both supposed to exist; the contract was executed and the vendee relieved; the vendor had it in his power to recreate the way, and was presumably directed to do so and make a conveyance thereof. Blakeman *v.* Blakeman (1872) 39 Conn. 320, Keener, Vol. 3, p. 72.

[55]In the following cases there was a mutual mistake as to title to real estate. Bingham *v.* Bingham (1748) 1 Ves. Sr. 126, Keener, Vol. 3, p. 5. The remarks of Mr. Justice Story on this case are conflicting. The learned author first cites the case (1 Equity Jurisprudence (13 ed. 1886) Sec. 124, p. 133) as opposing the general rule that there can be no relief on the ground of mistake in law unless the case can be explained on some other ground, such as undue influence, and then (1 Equity Jurisprudence, Sec. 141, p. 159) he cites the case as one of mistake in fact, in which equity can clearly give relief. In the note to Sec. 124 *supra*, however, he says the case is difficult to understand, and surmises that there were other facts not appearing in the report. Lessee entitled to relief, proceeding before paying any rent but after taking possession under the lease. Cooper *v.* Phibbs (1867) L. R. 2 Eng. & Ir. App. 149, Keener, Vol. 3, p. 43. Vendee allowed to defend in an action on the bond for the purchase money. Lawrence *v.* Beaubien (S. C. 1831) 2 Bail. 623. Owner of property which had been sold at tax sale bought his own title not knowing it had been redeemed. Martin *v.* McCormick (1854) 8 N. Y. 331. It is plain that the vendee does not have to offer or return his own land to the vendor in order to recover the price. Phillips *v.* O'Neal (1891)

In like manner, where there is a sale of personal property and there is a mutual mistake as to the title of the seller, the law will relieve the seller from the burden of the contract. Here, again, it is to be observed, that the seller cannot recover on the contract at law as he cannot perform his part, and that the only need of the interposition of equity is when the purchaser has paid the price and seeks to recover back his money, or sues the seller for damages for failure to perform. In most cases of sales of personal property, however, the mistake in title is not discovered until the purchaser has paid his money, and the seller has made the transfer under his supposed title. This point generally comes up under the heading of money paid under mistake.[56]

87 Ga. *727*; s. c. (1889) 83 Ga. 556, (1890) 85 Ga. 142. Purchase of a remainder in fee after an estate tail; both parties ignorant that the tenant in tail had suffered a common recovery. The deed had been executed and an absolute bond given for the purchase money. Equity afforded the vendee relief. Hitchcock *v.* Giddings (1817) 4 Price 135. Administrator of deceased sold land of the decedent, he and the purchaser supposing they were dealing with a fee. It turned out that nothing passed but the equity of redemption. Purchaser entitled to relief. Griffith *v.* Townley (1878) 69 Mo. 13. Money paid under the agreement before the time fixed is not money paid under mistake of fact because the vendor does not have to have title when he contracts to convey. See remarks of Learned, P. J., in Youmans *v.* Edgerton (N. Y. 1878) 16 Hun 28 at 32. Vendee discovered that vendor had no title, repudiated the contract, and was entitled to rescind and have back the money paid on account. Baptiste *v.* Peters (1874) 51 Ala. 158. So where the vendor and vendee think they are selling and buying the undivided interest of the vendor in the land, and it turns out that the vendor had a fee in the whole, the sale was rescinded, and the vendee was entitled to compensation for improvements, not, however, beyond the amount of the rents and profits. Irick *v.* Fulton (Va. 1846) 3 Gratt. 193. Executed contract; purchaser allowed to defend in an action on note for purchase money after tendering a deed for the land. Fleetwood *v.* Brown (1886) 109 Ind. 567; Bier *v.* Spaulding (N. Y. 1895) 92 Hun 388. See also Goettel *v.* Sage (1887) 117 Pa. St. 298; McKibben *v.* Doyle (1896) 173 Pa. 579; Bigham *v.* Madison (1899) 103 Tenn. 358; Champlin *v.* Laytin (N. Y. 1836) 6 Paige 189; s. c. (N. Y. 1832) 1 Edw. Ch.; Harlan *v.* Central Phos. Co. (Tenn. 1901) 62 S. W. 614, *semble;* Earl Beauchamp *v.* Winn (1873) 6 H. L. C. 223, *dictum.* Vendee, however, was not allowed to recover money paid vendor for a title which he supposed he had, but, in point of fact, he did not have. Johnson *v.* McGinness (1860) 1 Or. 292. Where the parties take into consideration possible defects in title and bargain with respect to them, there is no relief. Leal *v.* Terbush (1883) 52 Mich. 100. Distinguish case of mistake as to title in performance of a contract, discussed under heading of performance *infra;* for instance of, see Moyer *v.* Shoemaker (N. Y. 1849) 5 Barb. 319, Part IV *infra.*

[56]Accordingly, in the following cases of mutual mistake as to title to personal property, the law afforded relief: Sale of tax certificates mutually supposed to be valid which turn out to be void; purchaser entitled to relief. Hurd *v.* Hall (1860) 12 Wis. 125; Lawton *v.* Howe (1861) 14 Wis. 261; Stocks *v.* City of Sheboygan (1877) 42 Wis. 315. So where was a purchase and sale of an interest in a defunct mortgage, which was supposed by the parties to be alive, the purchaser was allowed to recover the money paid. Claflin *v.* Godfrey (Mass. 1838) 21 Pick. 1. Purchase

It is often said in these cases that there is an implied warranty of title and the right of the purchaser to recover depends on that implied warranty.[57] Of course, if in any given case there is such an implied warranty, and the thing sold turns out to be otherwise, the relief of the purchaser depends on the fact that he relied, from the circumstances of the case, consciously or unconsciously, on facts upon which the courts predicated the implied warranty, and therefore he did not make a mistake. It is probable, however, that the notion of implied warranty is a mere fiction, under cover of which the common law courts administered an equitable remedy.[58] Furthermore, if the action is brought on the warranty, the measure of damages will be different from that applicable where the suit is on the contract for failure to deliver.

Where, however, there is a sale of a patent, it has been decided that a failure of title to the patent will give the purchaser no ground for relief,[59] and although this decision has been followed,[60] it has been strongly criticised by Mr. Keener,[61] and there are *dicta* and decisions supporting his view.[62]

There are many cases, also, where there is a sale of a chose in action, such as a corporate security, note, etc., which although mutually supposed to be valid, turns out to be void. In these cases there is very little reference to the doctrine of implied warranty, but the purchaser is universally afforded relief in the shape of being allowed to recover back the money paid.[63]

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and sale of a supposed interest in a mining lease; purchaser allowed to recover money paid. Fisher *v.* During (1893) 53 Mo. App. 548. Sale of a bank charter supposed to be perpetual which contained a repealing clause, the mistake being based on an error in the certified copy of the charter; the legislature subsequently repealed the charter, and the contract was rescinded on the ground of failure of title. King *v.* Doolittle (1858) 38 Tenn. 77.

[57]The leading case on this point is Eichholz *v.* Bannister (1864) 17 C. B. [N. S.] 704, where the court said there was an implied warranty of title, and permitted the purchaser to recover back the money paid, it turning out that the goods had been stolen. For a similar case, see Burt *v.* Dewey (1869) 40 N. Y. 283.

[58]For a discussion of the subject of implied warranty of title, see Benjamin, Sales (2nd ed. N. Y. 1877) Sec. 627 *et seq.*

[59]Taylor *v.* Hare (1805) 1 B. & P. N. R. 260.

[60]Lawes *v.* Purser (1856) 6 E. & B. 930; Schwarzenbach *v.* Odorless Ex. Apparatus Co. (1885) 65 Md. 34.

[61]Keener, Quasi Contracts (1893) 38.

[62]Gibson, J., in Bellas *v.* Hays (Pa. 1819) 5 S. & R. 427 at 439; Geiger *v.* Cook (Pa. 1842) 3 W. & S. 266.

[63]The following are cases of mutual mistake as to validity of corporate securities: Scrip dividend certificates which had been declared void. Wood *v.* Sheldon (1880) 42 N. J. L. 421. Forged securities. Maedaner *v.* Beurhaus (1900) 108 Wis. 25. Forged certificates of stock. Westropp *v.* Solo-

Where the mistake is as to the existence or non-existence of an individual, the parties being in mutual error as to whether the person is dead, and the existence of that person is material to the contract, the law will grant relief because of the mutual mistake.[64]

Where there is a mutual mistake as to the value of the thing sold, in case of sales of personal property or real estate, with the exceptions hereinafter mentioned as to the latter, the law will not afford relief to either party,[65] and the same rule applies to the case of mutual mistake as to quality.[66]

Where, however, the mutual mistake as to value arises because

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mon (1849) 8 C. B. 345; Jones *v.* Ryde (1814) 4 Taunt. 488. Sale of forged bank note; the purchaser recovered the price paid. Case put by the court on the ground of failure of consideration. Guerney *v.* Womersley (1854) 4 E. & B. 133. Sale of certificate of execution under sale on a void judgment; regarded by court as a sale of a non-existent right. McGoren *v.* Avery (1877) 37 Mich. 120. Purchase of city bonds void for want of power of city to issue; purchase money recovered from city. Paul *v.* City of Kenosha (1867) 22 Wis. 256. Town issued void bonds to a R. R. Co. R. R. Co. sold bonds to third parties without notice of defects. It was held that an injunction would lie to restrain levy of tax to collect money for payment of the bonds. *Non constat,* however, that the purchaser from the R. R. Co. would have had a remedy against the Co. for the mistake. Rochester *v.* Bank (1861) 13 Wis. 432. See also, Brewster *v.* Burnett (1878) 125 Mass. 68.

[64]Purchase of a remainder. Mutual mistake as to the existence of the life tenant. Colyer *v.* Clay (1843) 7 Beav. 188; Moehlenpah *v.* Mayhew (1909) 138 Wis. 561. Sale of an annuity. Strickland *v.* Turner (1852) 7 Exch. 208; in this case the court put the decision on the ground that the purchaser paid his money without consideration, the thing bought not being really in existence. Purchase of a title depending on the death of a person afterwards discovered to be alive. Fleetwood *v.* Brown (1886) 109 Ind. 567. Contract between A. and B., agent for C., who is dead, of which both parties are ignorant; rescinded on complaint of A. Scruggs *v.* Driver's Exrs. (1857) 31 Ala. 274. So, also, where the beneficiary and a third person deal with a life policy, as by assignment, upon a mutual mistake as to the existence of the insured, assignor entitled to have assignment set aside; it turning out that the insured was dead, and the policy, therefore, worth more. Scott *v.* Coulson [1903] 2 Ch. 249.

[65]Wood *v.* Boynton (1885) 64 Wis. 265. So, also, in the case of an executed sale of a judgment and right as purchaser under the judgment. Stewart *v.* Bank (1908) 104 Me. 578. Executed sale of real estate; mutual mistake as to the value of the land. McCobb *v.* Richardson (1844) 24 Me. 82. Sale by note broker of note which, it subsequently turned out, was made by one who had made an assignment, of which fact all parties were in ignorance. Hecht *v.* Batcheller (1888) 147 Mass. 335; Harris *v.* Bank (1883) 15 Fed. 786. Mistake as to value of U. S. bonds, the Government having, unknown to the parties, extended the time for their conversion. Sankey's Exrs. *v.* Bank (1875) 78 Pa. St. 48. Sale of note, maker insolvent, no relief. Day *v.* Kinney (1881) 131 Mass. 37. Sale of ground rent under the mutual understanding that it was irredeemable, when in point of fact it was redeemable and therefore of less value; put by the court on the ground of mistake of law; no relief due the vendee. Clapp *v.* Hoffman (1894) 159 Pa. St. 531.

[66]Iron Co. *v.* Enterprise Co. (1883) 134 Mass. 433.

the parties both rely on the report or opinion of a third party, the law is otherwise, and the mistake is a ground of relief.[67]

Another exception to the rule as to the non-relievability of mutual mistake as to value occurs in cases of sales of real estate, most of which arise on a bill for specific performance, and the relievability of the mistake is probably dependent on the greater jurisdiction which equity has exercised over the performance of agreements for the sale of real estate and the great importance which the common law has attached to that species of property. The relief, however, is administered in like manner even after the deed has been delivered, in which case, where necessary, the law will give the vendee relief by way of defence in a suit for the balance of the purchase money, or allow the vendor to recover any balance of purchase money due, or, if necessary, rescind the contract and direct reconveyance by the vendee and repayment by the vendor.

The mistake as to value, however, must depend on a mutual error as to some specific circumstance connected with the land and affecting the value, as for instance, mistake as to quantity in sale of standing timber,[68] or mistake as to the existence of valuable natural deposits,[69] or a mistake as to existence of improve-

[67]Sale of chattel; the exact quality determined by third party, which determination turned out to be erroneous; purchaser recovered the overpayment in *assumpsit*. Coxe *v.* Prentice (1815) 3 M. & S. 344. Outgoing and incoming tenant had valuation of fixtures, etc. made by a third party, which was erroneous; party overpaying entitled to recover. Freeman *v.* Jeffries (1869) L. R. 4 Ex. 189. Where the parties both suppose the cash price of certain property is represented in an inventory made by a third party, and there is a mistake therein, the purchaser may recover the overpayment. Sheffield *v.* Hamlin (N. Y. 1882) 26 Hun 237. Agreement to exchange lands; mistake in survey on which the agreement was based, giving plaintiff five acres of defendant's land and defendant one acre of plaintiff's land; bill for specific performance refused. Gilroy *v.* Alis (1867) 22 Ia. 174. Agreement establishing a boundary line between adjoining owners based upon an erroneous survey made for both of the parties; mistake discovered a few days after the making of the agreement and before anything was done to carry it out; party prejudiced brought an action of trespass against the other and succeeded, his title being founded on a correction of the mistake. Coon *v.* Smith (1864) 29 N. Y. 392. See also Jenks *v.* Fritz (Pa. 1844) 7 W. & S. 201; Irwin *v.* Wilson (1887) 45 Ohio St. 426.

[68]Mistake in selling timber lands as so many feet of timber when it turned out that there was practically no timber on the land at all; contract cancelled. Thwing *v.* Hall & Ducey Lumber Co. (1889) 40 Minn. 184. Sale of standing timber; vendor and vendee mutually erred in fixing the line of the purchase to include timber lands belonging to a third party; vendee allowed a proportionate (one-third) defence in action for part of the purchase money. Blygh *v.* Samsom (1890) 137 Pa. St. 368.

[69]Vendee relieved from paying the consideration in such case. Dale *v.* Roosevelt (N. Y. 1821) 5 Johns. Ch. 174. Where, however, the party clearly takes the risk of oil being on the land, he can have no defence. Watts *v.* Cummins (1868) 59 Pa. St. 84.

ments,[70] or mistake as to area, which last circumstance requires more extended observation.

Where the vendor and vendee each thinks the land contains a certain area, and it turns out that there is an error and the difference is so great as to be material, and it appears that the price of the land was fixed by the area, the law will afford relief and the vendee may recover the excess price, if any, paid; and the vendor may recover the balance due because of the greater area conveyed, and in some cases the contract may be rescinded.[71]

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[70]Estate swept away by flood or destroyed by earthquake, by which, of course, is meant destruction of the improvements. Hitchcock *v.* Giddings (1817) 4 Price 135, 141 *dictum;* s. c. Daniels 1. There is a *dictum* of Clark, J., in Babcock *v.* Day (1883) 104 Pa. St. 4, that where the parties make a mistake in thinking a certain barn was on the land, when it was on an adjoining property, the vendee is entitled to have a reconveyance and ask for rescission.

[71]Vendor discovered the mistake one year after the deed was delivered, and the court entered a decree directing the payment of an additional compensation; there was an error here of 10,000 sq. ft. Lawrence *v.* Staigg (1866) 8 R. I. 256; Keener, Vol. 3, p. 229. Vendee allowed to have a deduction from the amount of the purchase money bond and mortgage; difference of 13 acres. Paine *v.* Upton (1882) 87 N. Y. 327; Keener, Vol. 3, p. 256. Parties agree to sell at so much an acre, the amount of acreage to be determined by a skillful artist, who made a mistake in his measurements; the vendee was allowed a *pro tanto* defence in action for the purchase money. Jenks *v.* Fritz (Pa. 1844) 7 W. & S. 201. In Glen *v.* Glen (Pa. 1818) 4 S. & R. 488, however, there was a contrary decision put on the ground that the proceedings were begun thirteen years after the delivery of the deed and after the vendor and vendee were dead; the excess here was in favor of the vendor, and the case may be explained on the ground that it was a gift.

Plaintiff vendee obtained relief in equity against vendor for deficiency in area; details of relief not given; contract probably rescinded *in toto.* Newton *v.* Tolles (1889) 66 N. H. 136; Keener, Vol. 3, p. 383. Sale of 200 acres at auction by administrator at so much an acre; purchase money paid; deed delivered conveying 585 acres; vendor entitled to recover the excess. Ladd *v.* Pleasants (1873) 39 Tex. 415. Sale of farm land at so much an acre, and it turned out that there was a deficiency in the number conveyed, purchaser was entitled to compensation. Shovel *v.* Bogan (1708) 2 Eq. Abr. 688. Mistake in quantity; vendor entitled to an abatement of the purchase price upon a bill for specific performance. This case is a good illustration of the flexibility of the decree of a court of equity in adjusting the rights of the parties. Hill *v.* Buckley (1811) 17 Ves. 394. Vendor discovered mistake before executing deed; difference between 490 and 400 acres; specific performance decreed only for 400 acres. Harrison *v.* Talbot (Ky. 1834) 2 Dana 258. Deed delivered, vendee entitled to abatement in suit on the bonds; question discussed as to how the amount of the abatement was to be fixed, difference between 250 and 150 acres. Yost *v.* Mallicotte's Adm. (1883) 77 Va. 610. Land was sold at a judicial sale, according to a survey, as containing 40 acres, and it afterwards appeared that it contained 128 acres; deed was delivered and the purchase money paid; the land was sold to pay debts of the decedent, and the heirs at law brought suit to recover the excess and recovered. The court said it made no difference whether the sale was by the acre or in gross, the great discrepancy being sufficient, in the view of the court, to move the Chancellor. Miller *v.* Craig (1886) 83 Ky. 623. Where the parties agree to sell a certain city lot for a specific sum under

The same principle applies even where the sale is for a lump sum if it appears that the question of the quantity of the land materially influenced the selling price.[72] In most cases of a sale for a lump sum, however, the land is sold as a whole, without reference to area, and the law affords no relief.[73] If there is a great discrepancy between the description and the premises conveyed, the law will sometimes interfere on that ground alone.[74] Where, however, it appears that in the course of the offer and acceptance or at the final settlement there is a doubt as to the quantity, and the parties close the agreement with that doubt in mind, each takes the risk and there is no relief.[75]

Where there is an agreement for the sale of land, and it is the intention of the parties to fix the price at so much per acre, the law compels the payment of the purchase money according to the quantity, and it is presumed that the parties intended a survey, even though not provided for in the agreement.[76]

In these cases, there is really a contract with one of its terms incomplete and unaccepted, and if the vendee accepts a deed describing the land without having made or insisted upon a survey, and pays part of the purchase money, he cannot defend in an action for the balance on the ground of deficiency, because he had an opportunity to correct the mistake and failed to do so. This is a

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a mutual mistake as to number of square feet it contained; held, the vendor could have the contract rescinded unless the vendee would accept the deed of the lot as it stood. Kane *v.* Demelman (1898) 172 Mass. 17. See also, Rogers *v.* Pattie (1898) 96 Va. 498; West Mining Co. *v.* Coal Co. (1875) 8 W. Va. 406. In the latter case, however, the vendor lost his right by laches and because of other circumstances.

[72]Yost *v.* Mallicotte's Adm. (1883) 77 Va. 610.

[73]Frederick *v.* Campbell (Pa. 1825) 13 S. & R. 136; Rodgers *v.* Olshoffsky (1885) 110 Pa. St. 147; Winston *v.* Browning (1878) 61 Ala. 80; Noble *v.* Googins (1868) 99 Mass. 231.

[74]Pratt *v.* Bowman (1893) 37 W. Va. 715.

[75]Ashcom *v.* Smith (Pa. 1830) 2 P. & W. 211; Weaver *v.* Carter (Va. 1839) 10 Leigh 37; Marvin *v.* Bennett (N. Y. 1840) 8 Paige 312.
For a discussion of the effect of the words "more or less," see Ashcom *v.* Smith *supra;* Coughenour's Adm'rs. *v.* Stauft (1874) 77 Pa. St. 191.

[76]Bailey *v.* Snyder (Pa. 1825) 13 S. & R. 160; Agnew, C. J., in Coughenour's Adm'rs *v.* Stauft (1874) 77 Pa. St. 191 at 195.
Where, however, a survey is made showing a deficiency, and the vendor allows an abatement accordingly in the price and the error in the survey was discovered nine years later, in consequence of which it appeared that the abatement should not have been made, it was held that the vendor could sue and recover the land or the money. Calhoun *v* Teal (1901) 106 La. 47; see *contra* Iverson *v.* Wilburn (1880) 65 Ga. 103, where the transaction was complete, to be explained probably on the ground of laches.

case where the vendee takes the risk of the fact being as he supposed it to be.[77]

Where, however, there is no evidence except the deed, and the description in the deed differs from the lot actually conveyed, neither party can have relief.[78]

There are a number of other cases of mutual mistake in the formation of the contract in which relief has been afforded which do not seem to fall within any of the groups we have just noticed. They are collected in the note.[79] And a few cases of mutual mis-

[77]Coughenour's Adm'rs *v.* Stauft (1874) 77 Pa. St. 191; Hershey *v.* Keembortz (1847) 6 Pa. St. 128. He must pay the price fixed in the articles of agreement. Bailey *v.* Snyder (Pa. 1825) 13 S. & R. 160. See also Smith *v.* Evans (Pa. 1813) 6 Bin. 102.

[78]Deed delivered; entire purchase money paid; action founded on supposed implied covenant as to quantity in the deed. Large *v.* Penn. (Pa. 1821) 6 S. & R. 488. Village lot deed delivered; purchase money paid; no relief. Kreiter *v.* Bomberger (1876) 82 Pa. St. 59. Farm land; deed delivered; action for purchase money; no relief. Boar *v.* McCormick (Pa. 1814) 1 S. & R. 166. The vendor's right may be affected by vendee's change of position, and consequently the vendor can have no relief after the vendee has sold and conveyed the property, and after a lapse of six years. Paulison *v.* Van Iderstine (1877) 28 N. J. Eq. 306. Where, however, the vendee has learned of the error and subsequently disposed of the land, he must pay or return the land. Pratt *v.* Bowman (1893) 37 W. Va. 715.

The vendee's right may likewise be affected. Thus, if the vendee makes improvements, after knowing of the mistake, to the prejudice of the vendor, he can have no compensation for improvements on the part he is required to restore. Gillespie *v.* Moon (N. Y. 1817) 2 Johns. Ch. 585. The vendee, however, is not in a position to defend if he has disabled himself from returning the lot as to which he claimed a deficiency by selling it to another person, particularly when he has sold it at a profit. Rodgers *v.* Olshoffsky (1885) 110 Pa. St. 147.

[79]Where the parties enter into an agreement to build a flour mill to conform to a certain test, as to which test, it subsequently turns out, there was a mutual error to the prejudice of the party who agreed to build the mill, it was held he was justified in abandoning the contract. Nordyke *v.* Marmon Co. and Kehlor (1899) 155 Mo. 643. A. and B. had been partners and had agreed to dissolve; they made a mutual mistake in striking the partnership acount; one partner gave his note to the other in payment of the amount supposed to be due by this account, and it was held, in an action on the note, that he could show the mistake in defence. Wildermann *v.* Donnelly (1902) 86 Minn. 184. A. leased a water power to be used in grinding pulp. Title was subject to a limitation preventing its use for that purpose, of which both parties were ignorant; it was held the lessor could not recover any rent. Bedell *v.* Wilder (1892) 65 Vt. 406. Agreement between adjoining owners founded on a mutual mistake as to the location of a party wall; it was held that the party obligated under the agreement could refuse to pay. Koenig *v.* Haddix (1886) 21 Ill. App. 53. Where the parties insure a ship bound to a certain port, and suppose that trade with that port is lawful, and the ship sails to the port and is seized, the entry being unlawful, unknown to the insured and the company, the company is not liable. Andrews *et al.* *v.* Ins. Co. (1822) 3 Mason 6.

take in which no relief was afforded are also collected in the note.[80]

We have now made a somewhat rough arrangement of some of the cases depending on the effect of mistake in formation of a contract, and the question is as to the principles involved. It appears that where the mistake is such that one of the parties cannot perform the contract as made, as where the mutual mistake is as to the existence of the thing sold, the existence of natural deposits agreed to be mined, mistake as to title, with an exception in the case of mutual mistake as to title to a patent, the law will give the party who is bound to perform, relief from the contract on some equitable ground, but his inability to recover on the contract depends solely on the common law, because he cannot aver performance or readiness to perform.

In these cases, if the party not prejudiced by the mistake has performed, he can recover back his performance on showing the failure to perform by the other party. There are, therefore, two separate questions, one, the right of a party to the contract to be relieved from its burden, the other, the right of the other party to recover back the performance under the contract. Upon what

A. purchased and paid for stock in a foreign corporation, which stock was issued to him at a price below its par value in violation of the laws of the State in which it was formed, and the certificate was some years afterwards declared void by the courts of that State. It was intimated that A. had a right to rescind the purchase and recover from the corporation the amount paid, but that he was barred by his laches, eight years having elapsed, as he was bound to use reasonable diligence to discover the law of the State of incorporation. Hallett *v.* New Eng. Roller Grate Co. (1900) 105 Fed. 217. Where certain notes were sold at 18% discount, and were represented by the seller to be business paper, and it turned out that they were accommodation notes and usurious and void in the purchaser's hands, it was held the latter could recover. Webb *v.* Odell (1872) 49 N. Y. 583.

[80]Where there is a sale of an encumbrance (note and trust deed), both parties supposing it to be a first encumbrance, and it turns out to be a second encumbrance, no relief. Sample *v.* Bridgforth (1894) 72 Miss. 293. Purchase of an interest in a manufacturing corporation with full opportunity to examine books, and mutual mistake as to state of certain accounts, no relief; Segur *v.* Tingley (1835) 11 Conn. 134; the court, however, said in this case, that the mistake was immaterial, being as to a small account not particularly affecting the result. Mutual mistake as to the existence of prior insurance by the same company on the same property. Policy issued not void, although a contract would not have been made if the existence of the prior insurance had been known. Iron Co. *v.* Insurance Co. (1883) 134 Mass. 433. Where there was a sale of the personal property and crops on a farm, the amount of which was unknown, the parties made a mutual mistake as to the quantity and settled accordingly. It was subsequently discovered that there was a mistake, and it was held that the purchaser was not entitled to recover the amount overpaid, since both parties had an equal opportunity to inspect the property. McCrea *v.* Longstreth (1851) 17 Pa. St. 316.

principle does the law protect the party who has suffered from the mistake? We have seen that in some instances he is protected and sometimes he is not.

It is very difficult to distinguish many of these cases from those where the relief is afforded on the ground of impossibility of performance.[81] The leading case on this point is *Clifford* v. *Lord Watts*,[82] where A demised to B certain land, with a covenant in the lease that B should dig not less than a certain amount of clay in each year and pay a royalty. B did not dig the amount, and A sued on the contract and assigned the breach. Plea on equitable grounds that defendant could not dig that amount of clay because there was not that much clay in the ground, which defendant did not know when he made the covenant, and the plea was sustained.[83] This is a plain case where the court, in a common law proceeding, allowed an equitable defence upon the ground of impossibility of performance, and is not to be distinguished from the cases heretofore referred to,[84] where there was a mistake as to the existence of natural deposits on land. The similarity of relief afforded has been noticed by several writers.[85] It may be concluded, therefore, that in the cases referred to, the party prejudiced by the mistake may be relieved from the burden of the contract when it turns out, on the facts as they really are, that it is impossible for him to perform the contract. The question as to when it is legally impossible to perform a contract is answered by the law of impossibility of performance and not by the law of mistake. It also seems that the party prejudiced by

[81]For cases of impossibility of performance see *Re* Companies Acts (1904) 117 L. T. 60, and note in 18 Harv. L. Rev. 64 (1904); Stanton *v.* N. Y. etc. R. R. Co. (1890) 59 Conn. 272; No. Pacific R. R. Co. *v.* American Trading Co. (1904) 195 U. S. 439; 18 Harv. L. Rev. 384 (1905); Houston Ice Co. *v.* Keenan (1905) 99 Tex. 79, and note in 19 Harv. L. Rev. 134 (1905); Baily *v.* De Crespigny (1869) L. R. 4 Q. B. 180; Bovine *v.* Dent and Wilkinson (1904) 21 T. L. R. 82, and note in 18 Harv. L. Rev. 392 (1905).

[82](1870) L. R. 5 C. P. 576.

[83]For a similar case, see Ridgely *v.* Conewago Iron Co. (1893) 53 Fed. 988.

[84]See n. 49 *supra*.

[85]Mr. Bishop, Contracts (2 ed. 1907) Sec. 587, treats the case of the sale of a non-existing thing which the parties believe to exist as a case of impossibility of performance; he says that there is a contract, and then, in Sec. 695, says that the stipulations are void. Mr. Pollock points out the difficulty of distinguishing between many cases of mistake and cases of impossibility of performance, (Wald's ed. 1906) 526, 540, (7 Eng. ed.) 419. See also Anson, Contracts (8 ed. N. Y. 1903) 390, 391.

the mistake can have no relief except the relief from the burden of the contract.[86]

The right of the party who has performed to recover back his performance depends on a different theory. The notion of failure of consideration is frequently adverted to,[87] but it must be confined to the case under discussion of a recovery of performance where the other party fails to perform.[88]

In most contracts one of the parties performs first, and unless he can do so with some confidence that he will receive the performance due him in return, the business of the community will be at a standstill. If, therefore, his confidence has been disappointed by the failure to receive the performance bargained for, the law must confer a remedy to enable him to recover back the performance, and it makes no difference whether the failure of the other party to perform was caused by mutual mistake in the formation of the contract or by any other cause; the result is the same in every case. It seems, therefore, that no question as to the effect of a mistake is properly involved in these cases.

There are, however, a number of cases of mutual mistake in formation where the party prejudiced by the mistake will be given relief, which obviously do not depend on the doctrine of impossibility of performance. Thus, where the parties assign a life policy under a mutual error as to the existence of the insured, or where there is a mistake as to value depending on an error in the opinion of a third person, or mistake as to value of real estate, some other principle must be invoked to explain the relief afforded. In all these cases the party prejudiced by the mistake can and generally has performed, and his right to recover must therefore depend on some other principle than that of impossibility of performance. The law on this point is probably as yet unde-

[86]Kerr, Fraud and Mistake (4 ed. 1910) 483.

[87]"Mistake perhaps not very different from want of consideration." Gibson, J., in Bellas *v.* Hays (Pa. 1819) 5 S. & R. 427 at 440. Mr. Keener says, in 1 Harv. L. Rev. 215 (1888), in an article entitled "Recovery of money paid under mistake of fact," that the equity in the plaintiff's favor is a failure of consideration rather than mistake, and that in this particular class of cases, he establishes equity mainly by failure of consideration, by showing that he parted with the money without receiving a certain equivalent because of mistake. See also Pollock, Contracts (Wald's ed. 1906) 732, (7 Eng. ed.) 599, and Benjamin, Sales (2 ed. N. Y. 1877) Sec. 414 *et seq.* Mr. Anson, Contracts (8 ed. N. Y. 1903) 157, calls attention to the practice "common even to learned and acute writers of blending mistake and failure of consideration."

[88]Of course, the term "failure of consideration" is used in another sense, as meaning that there is no consideration for the contract in the beginning. The distinction between the two meanings is clear.

veloped, and we have not collected enough cases to enable us to make any definite statement as to the principle involved. The relief afforded probably depends on the somewhat ambiguous principle that a court of equity will not permit one man to enrich himself unjustly at the expense of another, and it may be said that there is injustice when the parties have mutually made the same assumption as the basis of the formation of the contract, and it subsequently turns out that the fact is otherwise, in consequence of which one of the parties will suffer serious financial loss by performing the contract, and the other party will reap a corresponding financial advantage.

This principle, however, clearly does not apply to the case of a mutual mistake as to the value of the thing sold. Here the general principle that there can be no relief because of mistake applies. Equity declines to interfere in this case because public policy having in view the interests of business and commerce, requires that there must be some leeway for bargaining and some chance for one party or the other to gain some advantage; otherwise there would be no incentive to trade. In many commercial transactions there is, to a certain extent, a mistake by one party or the other as to the value of the thing sold. Courts of equity have refrained from interfering in these cases because it would be impossible to draw the line and determine how much of a mistake in value should be a ground for relief.

The case of mistake as to the value of land is an exception for several reasons: (1) the value of the land and the influence of the particular mistake on the price can be more easily and accurately ascertained than in a case of personal property; (2) land has not been generally considered the subject of trade and commerce; (3) the performance of agreements for the sales of land has always been under the special jurisdiction of the Chancellor, who is thus more easily enabled to apply equitable principles; (4) because of the great importance attached by the common law to real property.

It is commonly said that the mistake must be as to the subject matter or as to some intrinsic fact.[89] This principle, however, does not assist us because it does not tell us what is the subject matter or what is an intrinsic fact. It further fails to distinguish between (1) mistake involving impossibility of performance, (2)

[89]One writer speaks of extrinsic mistake and intrinsic mistake. This is obscure. It is not the mistake which is extrinsic or intrinsic, but the fact as to which the mistake is made.

mistake involving the principle of unjust enrichment, (3) the question of relieving one party from the burden of the contract because of mistake, and (4) the question of permitting one party to recover a performance on the ground of failure of performance on the other side. This question of mutual mistake in formation is the most difficult part of the whole subject, and it is probably not possible at the present time to offer any more definite conclusion on the matter.

Unilateral Mistake.

We come now to the case of unilateral mistake in formation of the contract, that is, a mistake made by one party only, and here we must distinguish two cases, one, where the mistake is known to the other party, and the other, where the mistake is not known.

As to the first case the law is clear and well settled. When one party makes a mistake in offer or acceptance, which mistake is not apparent to the other party, the party making the mistake cannot escape from the obligation of the contract; he must stand by his offer or acceptance as communicated to the other party.[90]

[90]Accordingly, in the following cases of mistake by one paryt, the law afforded no relief: Mistake in estimate. McCormack *v.* Lynch (1897) 69 Mo. App. 524; Moffett, Hodgkins & Clark Co. *v.* Rochester (1898) 91 Fed. 28, and see (1899) 178 U. S. 373, where the decision was reversed on the ground that the mistaken offer had been withdrawn before acceptance; Crilly *v.* Board of Education (1894) 54 Ill. App. 371; Brown *v.* Levy (1902) 29 Tex. Civ. App. 389; Douglas *v.* Grant (1882) 12 Ill. App. 273; Steinmeyer *v.* Schroeppel (1907) 226 Ill. 9. For a criticism of this case, see 2 Ill. L. Rev. 267 (1908), where the learned commentator takes the view that the decision holding the offeror to his offer amounts to taking property away from him and giving it to the other party for nothing and against his will; that a court of equity clearly would not decree specific performance and should award restitution.

Contractor who bid according to wrong plans cannot recover excess cost of performing the contract occasioned thereby; Electric Light Co. *v.* Poor District (1902) 21 Pa. Super. Ct. 95; the decision *contra* in Board *v.* Bender (1905) 36 Ind. App. 164 is opposed to the weight of authority. Offeror made a mistake in computing the price of cattle he offered for sale. Griffin *v.* O'Neil (1892) 48 Kan. 117. Intention to subscribe for $1,000 worth of stock; in fact, subscribed for $2,000. Diman *v.* Prov., Warren & Bristol R. R. Co. (1858) 5 R. I. 130; Keener, Vol. 3, p. 256. See, also, Path Valley R. R. Co. *v.* Brinley (1894) 15 Pa. C. C. 339, where the unilateral mistake in the subscription was induced by the fraudulent representation of a third party. Mistake by vendee in accepting deed of land in payment of a debt; Beebe *v.* Birkett (1896) 109 Mich. 663; court in this case seemed to consider the failure of the creditor to use ordinary care as material; of course, immaterial in the case of unilateral mistake. Mistake as to the effect of an agreement. Hawralty *v.* Warren (1866) 18 N. J. Eq. 124. Mistake in quoting price of goods. Star Glass Co. *v.* Longley & Robinson (1880) 64 Ga. 576. Mistake in showing the wrong sample. Scott v. Littledale (1858) 8 E. & B. 815; seller repudiated the

Many insurance cases are to be determined by the same principle. The insured applies for insurance, the company accepts, and the policy which is issued is written evidence of the performance by the insured, to-wit, the payment of the premium and of the obligation assumed by the company and yet to be performed. The application is the offer of the insured.[91] If the policy conforms to the application, no mistake by the insured in making the application can be the subject of relief. This is a case of a unilateral mistake in the formation of a contract.[92]

Where the unilateral mistake is on the part of the insurance company, the rule is different because the contract is one where it is the duty of the insured to disclose matters material to the

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sale but was held liable in a common law action; intimated by the court that there might be relief in a court of equity. Mistake in signing a document arising from ignorance of English and error of the interpreter. Phillip *v.* Gallant (1875) 62 N. Y. 256. Mistake as to the liability assumed by becoming a stockholder; put by the court partly on the ground of mistake of law. Upton *v.* Tribilcock (1875) 91 U. S. 45. Mistake by vendee as to quality of land. Taylor *v.* Fleet (N. Y. 1848) 4 Barb. 95. A., thinking he had been lawfully drafted, when it turned out he had not, contracted with B. to go as his substitute. Held, he could not be relieved from paying the amount promised. Harter *v.* Bomberger (1864) 47 Pa. St. 492. Mistake in making an exchange of lands. Duke of Beaufort *v.* Neeld (1844) 12 Cl. & F. 248. Where there was a lease of all the water on the lessor's land, the circumstance that the lessee believed that a particular spring was on the lessor's land, whereas it was situate on the adjoining land, is no defense to an action for rent. Bible *v.* Centre Hall Boro. (1902) 19 Pa. Super. Ct. 136. Mistake by vendee as to the land purchased; the court refused to reform the agreement of sale. Webster *v.* Stark (Tenn. 1882) 10 Lea 406. Mistake in thinking the article purchased would answer a certain purpose. Chanler *v.* Hopkins (1838) 4 M. & W. 398; Ollivant *v.* Bagley (1843) 5 Q. B. 288; Prudeaux *v.* Bunnett (1857) 1 C. B. [N. S.] 613. Mistake in written order for goods. Coates & Sens *v.* Buck (1896) 93 Wis. 128. Trustee made a unilateral mistake in dealing, as to the legal title, with the third person, and neither he nor the *cestui que trust* had any standing to be relieved from the consequences of mistake. Wilson *v.* Western Land Co. (1877) 77 N. C. 445. Mistake by vendor. Paulison *v.* Van Iderstine (1877) 28 N. J. Eq. 306, *semble.* For a case where the offer was ambiguous and the acceptor took an unreasonable view, see Butler *v.* Moses (1885) 43 Ohio St. 166.

See also Grant Marble Co. *v.* Abbot (Wis. 1910) 124 N. W. 264; Valve Co. *v.* Klingelhofer (1904) 210 Pa. St. 513; Silvernail *v.* Cole (N. Y. 1852) 12 Barb. 685, *semble;* Smith *v.* Hughes (1871) L. R. 6 Q. B. 597; Peirce *v.* Colcord (1873) 113 Mass. 372; U. S. *v.* Charles (1896) 74 Fed. 142; Grymes *v.* Sanders (1876) 93 U. S. 55; Keener, Vol. 3, p. 175.

[91]In some cases, however, the business custom is such that the application plays very little part in the transaction. See Mackenzie *v.* Coulson (1869) 8 Eq. Cases 368; Keener, Vol. 3, p. 267, discussed *infra* in Part III.

[92]In these cases, where there was such a mistake, the insured was afforded no relief. Ledyard *v.* Fire Ins. Co. (1869) 24 Wis. 496; Susquehanna Ins. Co. *v.* Swank (1882) 102 Pa. St. 17; Boyce *v.* Ins. Co. (1904) 24 Pa. Super. Ct. 589.

risk. Accordingly, in such case, the company can have relief from liability on the policy because of the unilateral mistake.[93]

So also where partners agree on dissolution, and one party buys the other out. In such case, if either makes a mistake in his estimate of the value of the business or of his or the other partner's share, and his offer to buy or sell is based on this error, the mistake is his, and the other partner having accepted the offer, the partner making the mistake cannot have any relief.[94]

If A has an interest in an estate, and he is induced to release or assign that interest in consideration of some benefit, and makes a mistake as to the value of his interest, it is a case of unilateral mistake in the formation of the contract, the contract being the promise to release or assign, on the one side, and a promise to pay, on the other. These cases come under the same principle, and the party releasing can have no relief.[95] If the other party in any way induces the mistake, it is a case of fraud.[96]

A court of equity will, however, sometimes refuse to decree specific performance against a party who has made a unilateral mistake in the formation of the contract.[97] Most of the cases which call for the application of this principle are cases of agreements for the sale of real estate.[98] In these cases, the court pro-

[93]Marine Insurance; owner of vessel knew it was lost. Gauntlett *v.* Sea Ins. Co. (1901) 127 Mich. 504. Fire Insurance; error as to interest of insured. Ins. Co. *v.* Butler (1880) 55 Md. 233.

[94]Brown *v.* Fagan (1880) 71 Mo. 563; Stettheimer *v.* Killip (1878) 75 N. Y. 282; DeVoin *v.* DeVoin (1890) 76 Wis. 66; Meinecke *v.* Sweet (1900) 106 Wis. 21; Crowder *v.* Langdon (N. C. 1845) 3 Ired. Eq. 476. It is important to distinguish the cases noted hereafter, where the partners have made a correct agreement of dissolution, and one or the other makes a mistake in carrying out the terms of the agreement. This distinction is sometimes difficult to draw.

[95]Gormly *v.* Gormly (1889) 130 Pa. St. 467, Keener, Vol. 3, p. 184; Lies *v.* Stub (Pa. 1837) 6 Watts 48; Cunningham *v.* Cunningham (1883) 20 S. C. 317; Hamblin *v.* Bishop (1889) 41 Fed. 74; *cf.* Morrison *v.* Morrison (1906) 101 Me. 131.

[96]In these cases of unilateral mistake, in releasing an interest in an estate, there were circumstances of fraud or undue influence present. Haviland *v.* Willets (1894) 141 N. Y. 35; Keener, Vol. 3, p. 144; Jordan *v.* Stevens (1863) 51 Me. 78; Keener, Vol. 3, p. 38; Lansdowne *v.* Lansdowne (1730) 2 Jacob & Walker 205, Keener, Vol. 3, p. 1; Gandy *v.* Macaulay (1885) L. R. 31 Ch. D. 1, Keener, Vol. 3, p. 239; Shurte *v.* Fletcher (1896) 111 Mich. 84.

[97]Kerr, Fraud and Mistake (4 ed. 1910) 479.

[98]In these cases the court refused to decree specific performance. Mistake by vendor in offer. Mansfield *v.* Sherman (1889) 81 Me. 365. Mistake by vendee in buying at auction, description of property misleading. Tamplin *v.* James (1879) L. R. 15 Ch. D. 215. Mistake on the part of the vendor. Mason *v.* Armitage (1806) 13 Ves. 25; Keener, Vol. 2, p. 930. Mistake on the part of the vendee in buying the wrong lot at an

ceeds on the principle that a decree of specific performance is not of strict right, and most of them depend on the circumstance that, by reason of the mistake, one party has obtained an advantage over the other, and to enforce specific performance would result in a transfer of the property at a great under-valuation. There must, however, be an honest mistake not imputable to the gross negligence of the party seeking specific performance.[99]

Where the terms of the contract are ambiguous, and where, by adopting the construction put upon them by the vendee, they would have an effect not contemplated by the vendor, but would compel him to include in the conveyance property not intended or believed by him to come within the terms of the contract, a bill for specific performance by the vendee will be dismissed.[100] The court will, however, grant a preliminary injunction to preserve

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auction sale. Malins *v.* Freeman (1837) 2 Keen 25; Keener, Vol. 2, p. 933. Mistake on the part of the vendor in his arrangement with the auctioneer. Day *v.* Wells (1861) 30 Beav. 220. So, where the vendor offered certain parcels of land at a lump sum, and after he received vendee's letter accepting the same, discovered that he had made a mistake in addition to the amount of $1,000, of which he gave immediate notice to the vendee, the court refused specific performance. Webster *v.* Cecil (1861) 30 Beav. 62; Keener, Vol. 2, p. 954. So, also, where the vendor was going to transfer a large amount of personal property to a man of bad reputation verging on insolvency, and supposed he could get certain security, which it turned out, under the law, he could not get, specific performance was refused. Patterson *v.* Bloomer (1868) 35 Conn. 57; Keener, Vol. 2, p. 956. Vendor not entitled to specific performance except on terms covering the error of the vendee. Baskcomb *v.* Beckwith (1869) L. R. 8 Eq. Cases 100; Keener, Vol. 2, p. 963. Vendee's mistake occurred because of negligence of the vendor's agents. Denny *v.* Hancock (1870) L. R. 6 Ch. App. 1; Keener, Vol. 2, p. 960. Where a first mortgagee, under a misapprehension as to the law, bids at a sheriff's sale under a junior encumbrance, thinking it necessary to protect his mortgage, a bill for specific performance by the plaintiffs in the suit was dismissed. Sullivan *v.* Jennings (1888) 44 N. J. Eq. 11; Keener, Vol. 2, p. 993. Where a vendor made a mistake in fixing the price of a lot on a plan at one-third the regular price, a bill for specific performance by the vendee was dismissed. The latter probably knew of the mistake but did not disclose it to the vendor. Chute *v.* Quincy (1892) 156 Mass. 189; Keener, Vol. 2, p. 1002. Vendor sold for $2,000 thinking he was selling for $2,100, close case. Burkhalter *v.* Jones (1884) 32 Kan. 5. Torrance *v.* Boulton (1872) L. R. 14 Eq. 124; 8 Ch. App. 118.

[99]In these cases, the mistake was not sufficient to appeal to the conscience of the Chancellor, and specific performance was decreed. Mistake of the vendee in examining covenants restricting the use of the land. Western R. R. Co. *v.* Babcock (Mass. 1843) 6 Met. 346, Keener, Vol. 2, p. 937; Morley *v.* Clavering (1880) 29 Beav. 94, Keener, Vol. 2, p. 949. Vendee misunderstanding at auction the parcel under sale because of deafness; price paid not extortionate, vendee's own fault. Van Praagh *v.* Everidge [1902] 2 Ch. 266; 16 Harv. L. Rev. 143 (1902). See also Dewey *v.* Whitney (1899) 93 Fed. 533; Powell *v.* Smith (1872) L. R. 14 Eq. 85.

[100]Baxendale *v.* Seale (1855) 19 Beav. 601; Keener, Vol. 2, p. 943.

the *status quo* until the hearing, even when there is a doubt as to the specific performance.[101]

Another instance of unilateral mistake occurs where there is a mistake by one of the parties as to the identity of the person with whom he is dealing. Thus, if A contracts face to face with C, thinking that C is B, the mistake exists in his own mind, and there is a perfect contract formed, because C is entitled to accept the offer made to him personally, and consider it so made unless there is something to indicate that the offeror has some other party in his mind.[102]

Another familiar instance of unilateral mistake is where the parties enter into a compromise of some disputed claim. Each one, of course, thinks the compromise is, under the circumstances, favorable to himself, and if it should subsequently turn out that he had made a mistake to his prejudice in the view he took of his case, he cannot have any relief, first, because the mistake is unilateral in forming the contract of settlement, and, secondly, because public policy favors the settlement of litigation and does not permit such statements to be lightly set aside. It may be observed, however, that there are several kinds of compromise: (1) compromise of claim for torts,[103] (2) compromise of claim of property right,[104] (3) compromise of contractual liability,[105] which last case

[101]Preston *v.* Luck (1884) L. R. 27 Ch. D. 497; Keener, Vol. 2, p. 985.

[102]Levy *v.* Terwilliger (N. Y. 1881) 10 Daly 194. B. in this case falsely represented himself as A. Edmunds *v.* Merchants Dispatch Co. (1883) 135 Mass. 283; Hand *v.* Gas Engine Co. (1901) 167 N. Y. 142. See, also, Fry, J., in Smith *v.* Wheatcroft (1878) L. R. 9 Ch. D. 223.

[103]Kowalke *v.* Milwaukee R. R. Co. (1899) 103 Wis. 472; McArthur *v.* Luce (1880) 43 Mich. 435; R. R. Co. *v.* McCarty (1901) 94 Tex. 298; Myer *v.* Haas (1899) 125 Cal. 560; Stewart *v.* R. R. Co. (1894) 141 Ind. 55; Bean *v.* R. R. Co. (1890) 107 N. C. 731.

[104]Fink *v.* Smith (1895) 170 Pa. St. 124; Mowatt *v.* Wright (N. Y. 1828) 1 Wend. 355; Perkins *v.* Gay (Pa. 1817) 3 S. & R. 327; Meckley's Est. (1853) 20 Pa. St. 478; Hall *v.* Wheeler (1887) 37 Minn. 522, Keener, Vol. 3, p. 99.

[105]The following are cases of compromise of contractual rights, in which there is no relief. Where suit is brought on the claim and the defendant pays a sum in full settlement and the suit is discontinued, he cannot subsequently recover the money paid on the ground that he has discovered a receipt which shows that there was nothing really due and the claim was unfounded. Natcher *v.* Natcher (1864) 47 Pa. St. 496. Compromise between vendor and vendee as to disputed boundary line. Carlisle *v.* Barker (1876) 57 Ala. 267. Controversy between vendor and vendee as to conveyance. Erkens *v.* Nicolin (1888) 39 Minn. 461. See also Stewart *v.* Stewart (1839) 6 Cl. & Fin. 911; Trigge *v.* Lavolee (1862) 15 Moore P. C. 270; Troy *v.* Bland (1877) 58 Ala. 197; Bergenthal *v.* Fiebrantz (1879) 48 Wis. 435; Graham *v.* Meyer (1885) 99 N. Y. 611; Morris *v.* Munroe (1860) 30 Ga. 630; Stover *v.* Mitchell (1867) 45 Ill. 213; McClellan *v.* Kennedy (1855) 8 Md. 230; Warren *v.* Williamson (1874) 67 Tenn. 427; Smith *v.* Penn. (Va. 1872) 22 Gratt. 402.

is the only one of the three which falls within the scope of this article.

Where the money is paid after suit is brought, it is, nevertheless, a compromise and so considered if paid at any time before judgment is rendered.[106] Where, however, the claim has been reduced to judgment, the contract is merged in the judgment, and the case of mistake in dealing with the judgment is that of non-contractual mistake and beyond the limits of this discussion.

Where one party to the contract makes a unilateral mistake in formation, and discovers the mistake before performance, he may, of course, refuse to perform and stand an action at law for damages, and the other cannot enforce performance unless the case comes within the jurisdiction of a court of equity.

In *Sherwood* v. *Walker*,[107] a cow of valuable breed, supposed to be barren, was sold for beef. Before the purchaser obtained possession of the animal, the seller learned she was with calf, and therefore of great value, and undertook to rescind the sale by refusing to deliver the cow. The purchaser brought replevin, and it was held that he could not recover. The court thought it necessary to discuss the question of mistake, which, however, did not figure in the case at all, as it merely involved a question of whether specific performance could be enforced. Of course, if the mistake is in the offer and is discovered before acceptance, it may be revoked and the offeror saved from the consequences of his mistake.[108]

A case of some difficulty arises where the unilateral mistake is known to the other party and he joins in the formation of the contract with the mistake uncorrected. The question of how far he is under a duty to disclose his superior knowledge is determined by principles of the law other than those we have under discussion, and where there is such a duty to disclose and failure to observe it, there is generally a case of fraud.[109]

So, also, where a party orders goods from a store where he

[106] Accordingly no relief. Beard *v.* Beard (1885) 25 W. Va. 486.

[107] (1887) 66 Mich. 568.

[108] Sweeney *v.* Bienville Water Sup. Co. (1898) 121 Ala. 454.

[109] Venable *v.* Burton (1907) 129 Ga. 537; McCormick *v.* Miller (1882) 102 Ill. 208; close case, Stone *v.* Moody (1907) 47 Wash. 158; Brown *v.* Montgomery (1859) 20 N. Y. 287; Gordon *v.* Irvine (1898) 105 Ga. 144; Nicholson *v.* Janeway (1863) 16 N. J. Eq. 285; Montgomery Co. *v.* American Emigrant Co. (1877) 47 Ia. 91; Trigg *v.* Read (Tenn. 1845) 5 Hump. 529.

Undue advantage taken of the other party's position and ignorance. Jordan *v.* Stevens (1862) 51 Me. 78.

has been in the habit of dealing, or which he thinks is being run by a certain individual, and, unknown to him, another person has bought the store and undertakes to supply the goods, there is no contract. There is a unilateral mistake as to the person, on one side, which must, in the course of business, be known to the other party, and of which the latter cannot take advantage.[110] But where the customer discovers the change before he appropriates the goods, there is a contract. By retaining or receiving the goods after knowledge of the change, he recognizes the other party as the seller.[111]

Where, however, there is no duty to disclose, and the parties deal at arm's length, there is usually no obligation to inform the other party of the mistake. Thus, where the mistake is as to the value of the article sold, or as to the quality of the land, as the existence of a mine, etc., the party having the superior knowledge may avail himself of that knowledge.[112]

(To be concluded.)

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[110]Boulton *v.* Jones (1857) 2 H. & N. 564. The seller (new party) unable to recover for the goods consumed. Ice Co. *v.* Potter (1877) 123 Mass. 28.

[111]Barnes *v.* Shoemaker (1887) 112 Ind. 512; Mudge *v.* Oliver (Mass. 1861) 1 Allen 74; Mitchell *v.* Lapage (1816) Holt N. P. 253.

[112]Accordingly, in the following cases of unilateral mistake, known to the other party, there was no relief. Mistake as to value. Laidlaw *v.* Organ (1817) 2 Wheat. 178, 195. Vendee knew of valuable deposit of sand chrome. Harris *v.* Tyson (1855) 24 Pa. St. 347. Vendee knew of mine vendor's ignorance. Fox *v.* McCreath (1788) 2 Bro. Ch. 400; Smith *v.* Beatty (N. C. 1843) 2 Ired. Eq. 456. Mistaken idea of vendor as to value of land. Law *v.* Grant (1875) 37 Wis. 548. See, also, as to a patent right. Rockafellow *v.* Baker (1861) 41 Pa. St. 319.